No. 4093.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BLANCHE CASCADEN, as Administratrix of the Estate of DAVID H. CASCADEN, Deceased, (Substituted Plaintiff for DAVID H. CASCADEN and BLANCHE CASCADEN, as Guardian of the Estate of David H. Cascaden, an Insane Person,

Plaintiff in Error,

vs.

GEORGE WEBER,

Defendant in Error.

UPON WRIT OF ERROR TO THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, FOURTH DIVISION.

Brief of Plaintiff in Error

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STATEMENT OF THE CASE.

This action was brought for the recovery of the amount of two promissory notes, one for the sum of $3,000.00, dated October 31, 1917, due six months after date, and the other for $500.00, dated June 25, 1918, due six months after date. The first note was originally made and delivered to the Farmers Bank

of Fairbanks by the defendant in error and one David Petree. Thereafter, when that note matured, the makers were unable to pay the same, and the payee agreed to extend the time of payment for a period of sixty days if the plaintiff in error would sign the same, and the plaintiff in error did sign the note as surety, and the time for payment was so extended by the payee (Tr. 28 and 29). The plaintiff in error thereafter paid the note, which fact is admitted in the amended answer (Tr. 11). The defendant in error admits the execution, delivery and non-payment of the $500.00 note. He contends, however, that the $3,000.00 note was paid by the execution and delivery of a promissory note for $3,033.00 by the Fairbanks Beverage Company, Inc., to the plaintiff in error (Tr. 12 and 13). But the latter note was given the plaintiff in error merely as security for the payment of the $3,000.00 note described in the complaint, and the Fairbanks Beverage Company, Inc., note was never paid (Tr. 17). The $3,000.00 note sued on in the complaint was never surrendered by the plaintiff in error to the makers (Tr. 50, 79 and 80).

The counter-claim for $2,000.00 pleaded in the amended answer (Tr. 13 and 14), is based on a promissory note for $2,000.00, dated February 5,

1918, due on or before July 1, 1918, payable to the defendant in error and signed by the plaintiff in error and one D. Petree, but that note was given the defendant in error to indemnify him against liability on a note of one Frank Allberg against defendant in error and David Petree (Tr. 19, 20, 42 and 71).

Defendant in error was never compelled to pay any portion of the Allberg note and never did pay any portion thereof. Allberg cancelled the obligation without payment before the commencement of this action and surrendered and returned the note to the defendant in error (Tr. 42 and 71).

The cause was submitted to the jury by the Trial Judge and a verdict was rendered for the defendant in the sum of $1,500.00 principal, with interest on $2,000.00 at the rate of one per cent per month from the 5th day of February, 1918, to the 25th day of June, 1918, together with interest at a rate of one per cent per month on $1,500.00 from the 25th day of June, 1918, to the date of judgment, and for the sum of $250.00 attorney's fees (Tr. 156), and judgment was entered on the verdict for the amount of the verdict and costs.

SPECIFICATIONS OF ERROR.

The court erred in refusing to give to the jury the following instructions requested by the plaintiffs:

I.

To direct the jury engaged in the trial of the above entitled cause to bring in a verdict in favor of the plaintiffs upon plaintiffs' second cause of action, set forth in their complaint, said motion being made after all the evidence had been introduced in said cause.

II.

"You are instructed that the defendant admits in his pleadings the making, execution and delivery of the promissory note described in plaintiffs' second cause of action, and unless you are satisfied that the defendant has proved by a preponderance of evidence that David H. Cascaden, together with Dave Petree, is indebted to defendant on the promissory note described in defendant's answer, your verdict must be for the plaintiffs on their second cause of action set forth in their complaint."

III.

"You are instructed that in the first instance the plaintiffs were obliged to prove the allegations of their complaint by preponderance of evidence, and when that was done, then the burden shifted to the defendant to disprove plaintiffs' case and to prove the affirmative

matter set forth in his answer by a preponderance of evidence, and that so far as the counterclaim set forth in defendant's answer is concerned, he becomes the plaintiff and the burden of proof shifts to him and he must prove the allegation of said answer as regards the counterclaim by a preponderance of evidence."

IV.

"You are instructed that the plaintiffs in this action claim that the note for $2,000.00 given by David Petree and David H. Cascaden to George Weber was to protect the defendant from loss if he was compelled to pay to one Allberg the sum of $3,000.00 alleged to have been due to said Allberg, and if you are satisfied from the evidence that that was the purpose for which said note was given, then you are instructed that if said Weber did not pay said Allberg the sum of $3,000.00, then said note was without consideration and neither of the makers thereof would be liable to said Weber for any part thereof. And if you are satisfied that said note was given for the purpose set forth, then the burden is on the defendant to show that said payment was made to said Allberg or someone for his use and benefit, prior to the time of the filing of defendant's amended answer in this cause."

V.

"You are instructed that there must be a good and valuable consideration for every contract or said contract cannot be enforced, and you are further instructed that if the consideration for the contract is the performance by the person for whose benefit said contract is made of some act in the future, and he fails to per-

form said act or acts, then the consideration for said contract is said to have failed, and said contract cannot be enforced."

The court erred in giving to the jury the following instructions:

VI.

"You are instructed that the defendant George Weber, as a counterclaim, claims that plaintiff David H. Cascaden is indebted to him in the sum of $2,000.00, together with interest thereon, on a promissory note signed by David H. Cascaden, plaintiff in this case, and David Petree, dated February 5, 1918, less the sum of $500.00, with interest, on a promissory note given to David H. Cascaden by defendant George Weber on the 25th day of June, 1918, which last mentioned note for $500.00 is set up as the second cause of action in plaintiffs' complaint. And you are instructed that there being no competent evidence introduced by the plaintiff in opposition to said claim, the court now instructs you that you should find for the defendant George Weber with reference to said counterclaim; that is to say, for the sum of $1,500.00 principal, with interest on the sum of $2,000.00 at the rate of one per cent per month from the 5th day of February, 1918, to the 25th day of June, 1918, together with interest at the rate of one per cent per month on the sum of $1,500.00 from the 25th day of June, 1918, to this date; and also for such further sum as you deem reasonable for attorney's fees."

VII.

"You are instructed that by reason of the

foregoing instruction there is left for your consideration to be determined by you whether or not the plaintiff could prevail as to the first cause of action set forth in the complaint, in which the plaintiff alleges that the defendant George Weber is indebted to plaintiff in the sum of $3,000.00 and interest on a certain promissory note dated the 31st day of October, 1917, which is set forth in paragraph 4 of plaintiff's complaint, and which it is alleged that the plaintiff David H. Cascaden paid on the 25th day of June, 1918, in full, together with $30.00 interest thereon, and which it is alleged that the defendant Weber has not repaid to the plaintiff, and that the whole of said sum of $3,030.00 with interest at the rate of one per cent per month from the 25th day of June, 1918, is now due and unpaid; and also for the sum of $600.00 attorney's fee in instituting and conducting this litigation with reference to this first cause of action; and also for the sum of $150.00 for instituting and maintaining the litigation with reference to plaintiff's second cause of action on the note for $500.00, with interest, the principal of which said note and interest is admitted by the defendant to be due to the plaintiff."

VIII.

"You are further instructed that if one of the signers of a note is compelled to pay the whole note, any or all the other signers of the note are liable for the repayment to the party who paid the note of the amount that was paid on the note over and above what was for the personal use or benefit of the person who paid the note; and if you are satisfied by a fair preponderance of evidence that no part of the

money represented by the $3,000.00 note given to the Farmers' Bank of Fairbanks was for the use and benefit of David H. Cascaden, then you are instructed that the defendant would be liable to David H. Cascaden and to his guardian for the entire amount that said David H. Cascaden was compelled to pay to the Farmers' Bank of Fairbanks, unless you find that said indebtedness of Weber and Petree was transferred to the Fairbanks Beverage Company by and with the consent of said David H. Cascaden."

IX.

"You are instructed that if David H. Cascaden paid the note set forth in plaintiff's first cause of action to the Farmers' Bank of Fairbanks and took a note for $3,033.00 and a mortgage from the Fairbanks Beverage Company, this act on the part of Cascaden constituted a payment of the promissory note set forth in plaintiff's first cause of action; and the question as to whether or not the mortgage so taken was a first or second mortgage is immaterial, and also as to whether or not said note of $3,033.00 was or was not paid by the Fairbanks Beverage Company is immaterial, because the debt was changed by the aforesaid transaction from David Petree and defendant to the Fairbanks Beverage Company by express agreement with plaintiff Cascaden; and in that event the defendant Weber was released entirely from any obligations on account of said note set forth in plaintiff's first cause of action, and the said Cascaden can look only to the Fairbanks Beverage Company for payment of the said note for $3,033.00, and the defendant Weber would not be responsible for the payment of the same, or

any part thereof, and your verdict should be for the defendant on plaintiff's first cause of action."

X.

"You are instructed that there is no evidence in this case whatever that would tend to prove that the note for $3,033.00, executed by the Fairbanks Beverage Company in favor of plaintiff David H. Cascaden, was given as additional security for the payment of said promissory note marked Plaintiff's Exhibit 'A'; and there is nothing contained in the complaint of plaintiffs by which competent evidence could be introduced to show that said note for $3,033.00, executed by the Fairbanks Beverage Company to the plaintiff David H. Cascaden, was given as additional security for the payment of said note of $3,000.00, marked Plaintiff's Exhibit 'A'; and the jury are therefore instructed that they would not be warranted in considering said note of $3,033.00 as additional security for the payment of said promissory note marked Plaintiff's Exhibit 'A'."

ARGUMENT.

In this brief the parties hereto will be designated as the plaintiff and defendant as they were in the Trial Court, that is, plaintiff in error we will designate as plaintiff, and defendant in error as defendant.

The first Specification of Error is based on the refusal of the court to grant plaintiff's motion to dismiss the affirmative defense and counterclaim of

the defendant's amended answer, and for a directed verdict thereon. We insist that the motion should have been granted on the ground and for the reason that it conclusively appears from all evidence in the record that there was no consideration whatever for the execution of the note, so far as David H. Cascaden is concerned; that all the evidence shows that at the time of the execution of the note Cascaden was not indebted to the defendant in any sum whatever, and that the signing of the note by Cascaden was not made a condition of the acceptance of the note by the defendant; that defendant did not request Cascaden to sign the note, and did not know that the note was signed by Cascaden until after it had been delivered to the defendant. It further appears that there was no obligation whatsoever on the part of Cascaden to sign the note, and that he was a voluntary maker of said note without consideration and without solicitation on the part of the defendant or any one else (Tr. 38, 39 and 48).

We will consider and discuss the second, third and fourth Specifications of Error together. They set out plaintiffs' first, second and sixth requested Instructions (Tr. 151 and 152). Such requests to charge the jury are predicated on plaintiffs' de-

fense to the note pleaded in the counterclaim of defendant's answer, and are based on plaintiffs' contention that there was an issue of fact raised by the pleadings and proof which should have been submitted to the jury. We contend the instructions tendered state the law correctly, and were not substantially covered or included in the instructions given the jury by the court. While it is true that a promissory note is *prima facie* evidence of indebtedness and of consideration, yet when want or lack of consideration is pleaded and proof is offered and received to sustain such pleading, then it devolves upon the parties alleging the indebtedness evidenced by such note to satisfy the jury by a preponderance of evidence that such note was given for a valid consideration.

8 C. J., 996.

> "The rule is well settled in this commonwealth that in an action on a promissory note the burden of proof is upon the plaintiff to establish the fact that it is given for a valuable consideration. While the production of the note, with the admission or proof of the signature, makes a *prima facie* case, yet if the defendant puts in evidence of a want of consideration, the burden of proof does not shift, but remains upon the plaintiff, who must satisfy the jury by a fair preponderance of the evidence that the note was for a valid consideration."

Huntington vs. Shute, 62 N. E., 380.

Tinker vs. Midland Valley Mercantile Co., 231 U. S., 681;

34 Supreme Court Reporter, 252;

Render vs. Arkansas Valley Trust Co., 196 Federal 1.

"Where in an action on a note defendant denied that there was a consideration for the note, the burden of proof was on plaintiffs."

Seager vs. Drayton, 105 N. E., 461.

"Where in an action on negotiable notes between the original parties, the defendant introduces evidence of want of consideration, the burden of proving consideration rests on the plaintiff."

Cawthorne vs. Clark, 138 N. W., 1075.

Bogie vs. Nolan, 96 Mo., 85; 9 S. W. 14.

Search vs. Miller, 1 N. W., 975.

"By the Negotiable Instruments Law the burden of showing want of consideration rests upon the defendant sued on a note, and if he offers any evidence on the head, the plaintiff must show consideration by a fair preponderance of the evidence."

Bank of Gresham vs. Walch, 76 Ore., 272; 147 Pac., 534.

Hudson vs. Moon, 42 Utah, 377; 130 Pac., 774.

Plaintiff in her amended reply pleads want and lack of consideration for the execution and delivery of the promissory note for $2,000.00 pleaded in the counterclaim of the defendant's answer, and she

alleges that said note was given to indemnify defendant against any liability on a certain promissory note which defendant and one David Petree executed in favor of one Frank Allberg; that defendant was never compelled to and never did pay any part of such note (Tr. 19). The plaintiff testified (Tr. 69, 70 and 71):

"Q. What, if anything, did you ask Mr. Weber at that time in regard to any indebtedness that he claimed to be due from Dave Cascaden?

A. What was the first part of that?

Q. What question did you ask of him?

A. Oh, I asked Mr. Weber how it came that Dave owed him money, and he says, "Well, Dave didn't owe me"—he says, "He don't owe me anything." "Well," I says, "you are suing him for some money." "Well," he said, "that is"—"well," he says, 'Dave don't owe me anything," he says "That is something to do with Petree," he says. "We promised to pay"—I think he said Alberg, they owed him something like three thousand dollars and something, and he said, "We agreed to pay that." He says, "The firm has nothing to show for that, but," he said, "we don't—Dave doesn't owe me anything, but," he says, "I have agreed to pay that, and" he says, "it is Petree's note." That's about the words he said. I think I wrote it down, Mr. Clark, and gave it to you right after.

Q. How long after you had this conversation did you write it down?

A. About five minutes from the time he

left. I went in the house and wrote it down so I wouldn't forget it.

Q. Had you, at my request, seen him to endeavor to find out what the basis of his claim was?

A. No, sir. Not at your request, Mr. Clark, exactly.

Q. Well, I had discussed with you before that how it came about Dave was on any note to Weber?

A. Yes, you asked me that.

Q. Was it after that you had this talk with him?

A. Yes, sir.

Q. And then you made a memorandum of this conversation?

A. Yes, and I brought it right up to your office.

Q. I will ask you to look at that memorandum, and ask you if that is the memorandum that you made a few minutes after your talk with Mr. Weber?

A. Yes, sir.

Q. What does that say?

A. Well, I have "Three thousand, Weber and Petree; three thousand paid afterwards Dave Cascaden; three thousand still due Ahlberg. Two thousand was to secure George in 1918, February 6th, when he left for outside, against balance of three thousand note due Ahlberg. Firm was to pay Ahlberg three thousand, but has nothing to show."

Q. Directing your attention to this part

of the memorandum that says 'two thousand was to secure George in 1918, February 6th, when left for the outside against balance of three thousand dollar note due Ahlberg.' Did Mr. Weber make that statement to you at that time?

A. He did, Mr. Clark.

Q. And you were referring to that two thousand dollar note that he has set up in his answer in this case?

A. Yes, sir; that is the note."

The defendant testified (Tr. 42, 44 and 45):

"Q. How much did you pay for the bottling works?

A. Nine thousand dollars. That was the price.

Q. How much was paid in cash?

A. Three thousand.

Q. Who paid it?

A. Mr. Petree and myself.

Q. How much did you put up?

A. I put up my share.

Q. How much was that?

A. Fifteen hundred.

Q. You are sure that you put up the fifteen hundred at that time?

A. Yes.

Q. That only accounted for three thousand. Now where was the rest of it, where did the rest of it come from?

A. Three thousand dollars borrowed from the Farmers Bank and three thousand we still owed.

Q. Where is that note that you gave to Ahlberg for the remaining three thousand dollars?

A. That is in the possession of Mr. Roth, I believe.

Q. That has never been paid, has it?

A. No.

Q. That is signed by you and Petree?

A. Yes.

Q. Then that three thousand dollars that was borrowed from the Farmers Bank was the second three thousand that was paid on account?

A. Yes." (Tr. 42).

"Q. About how much was paid altogether?

A. I couldn't recollect anything about it, Mr. Clark.

Q. How did it figure out that Petree owed you just two thousand dollars?

A. That is what we figured up that time.

Q. Isn't it a fact, Mr. Weber, that note was given to you to protect you in the event that you had to pay to Ahlberg the balance of that three thousand dollars?

A. Not as I recollect it.

Q. Now isn't it possible that is what it was given for?

A. I don't think so.

Q. Didn't you tell Mrs. Cascaden that that is what it was given for?

A. No, not as I recollect.

Q. Mr. Weber, you remember last spring, that is, in the spring and early summer of 1922, there was some litigation between yourself and the Cascaden estate?

A. Yes, sir.

Q. And you finally settled the litigation, it was finally settled? You remember that, don't you?

A. It was settled by foreclosure, yes.

Q. No, you remember the suit that you brought, Mrs. Cascaden settled it and gave you some syrups and other stuff that was up there?

A. That was William Bittner.

Q. It represented a part of your account, didn't it?

A. Of some wages we put in, yes.

Q. You remember when that case was settled, don't you?

A. Yes.

Q. Do you remember a day or two after that was settled about having a talk with Mrs. Cascaden at the gate where she was living up at the Heilig house?

A. Oh, yes, that is correct.

Q. Do you remember her at that time asking you how it happened that Dave Cascaden owed you any money? Do you remember her asking you that?

A. About this note, yes, that's correct.

Q. Did you not say to her at that time that 'Dave Cascaden doesn't owe me anything'?

A. Well, originally it was Mr. Petree's note, yes.

Q. Well, didn't you tell her that Dave Cascaden didn't owe you anything, that Petree is the man who owed you the money?

A. Originally, yes.

Q. And didn't you tell her at that time that when you were getting ready to go outside you were afraid that you might have to pay the Ahlberg note and that that note was given, this note for two thousand dollars was given you to protect you against having to pay all of that three thousand dollar note?

A. Not the same words to the same effect, no, Mr. Clark.' (Tr. 44 and 45).

"When such a prima facie case is established the burden of evidence is then shifted upon the party who does not have the affirmative of the issue, the position of the burden of proof being in no way affected. Since affirmative action of the tribunal demands that the party who has the burden of proof shall at the end of the trial stand in possession of a prima facie case in his favor, the party who has not the affirmative of the issue succeeds for the time being, if he can impair the prima facie quality of the case against him, and the burden of evidence thereupon returns to the party having the burden of proof; and this process continues until the stock of relevant facts is exhausted." (16 Cyc. 934).

The pleadings and proof in this case show that

David Cascaden had been, prior to the commencement of this action, adjudicated an insane person and during all of the time between the commencement of the trial until after judgment was entered he was confined in a hospital for the insane; that after the entry of judgment and prior to the date of the prosecution of this Writ of Error he died, and his wife, Blanche Cascaden, was appointed administratrix of his estate and in such capacity was substituted as plaintiff in error, (Tr. 182, 183, 184). Under such circumstances, the testimony of the defendant, who was the only person called at the trial who could have been cognizant of all of the facts and circumstances surrounding the various transactions bearing on the present controversy between the estate of the deceased Cascaden and the defendant, should be carefully and critically scrutinized. It will be observed that his testimony concerning the $2,000.00 note pleaded in his counterclaim was very unsatisfactory. He testified (Tr. 44), in response to the following questions:

> "Q. Isn't it a fact, Mr. Weber, that note was given to you to protect you in the event that you had to pay to Ahlberg the balance of that three thousand dollars?
>
> A. Not as I recollect it.
>
> Q. Now isn't it possible that is what it was given for?

A. I don't think so.

Q. Didn't you tell Mrs. Cascaden that that is what it was given for?

A. No, not as I recollect."

And again (Tr. 45), he testified as follows:

"Q. Do you remember her at that time asking you how it happened that Dave Cascaden owed you any money? Do you remember her asking you that?

A. About this note, yes, that's correct.

Q. Did you not say to her at that time that 'Dave Cascaden doesn't owe me anything'?

A. Well, originally it was Mr. Petree's note, yes.

Q. Well, didn't you tell her that Dave Cascaden didn't owe you anything, that Petree is the man who owed you the money?

A. Originally, yes.

Q. And didn't you tell her at that time that when you were getting ready to go outside you were afraid that you might have to pay the Ahlberg note and that that note was given, this note for two thousand dollars was given to you to protect you against having to pay all of that three thousand dollar note?

A. Not the same words to the same effect, no, Mr. Clark."

If the defendant considered the two thousand dollar note a valid claim against Cascaden, why did he not insist on applying the $500.00 which he received from Cascaden on the 25th day of June,

1918, toward the payment of that note, instead of giving his own note for the latter amount to Cascaden?

The defendant testified (Tr. 38), regarding that matter as follows:

> "Q. And how did you come to give him a note for it?
>
> A. Well, he wouldn't accept it on this note here, on the other one I had from Mr. Petree, because he didn't owe it to me."

Defendant admits that at the time of the execution of the two thousand dollar note he and Petree were indebted to Ahlberg on a note and that that note was never paid, but was surrendered to him and was in the possession of his attorney during the trial (Tr. 42 and 82).

Was the two thousand dollar note pleaded as a counterclaim given to indemnify defendant against liability on the Ahlberg note? Obviously that question should have been answered by the jury under proper instructions, and we contend the instructions requested by the plaintiff correctly state the law and should have been given by the Court.

The 5th Specification of Error is the Court's refusal to give the jury plaintiffs' requested instruction No. 7 (Tr. 152 and 153). We submit,

while the charge requested states an abstract proposition of law, yet it should have been given to the jury because it states the law correctly and is not covered by the instructions given.

The 6th and 7th Specifications of Error are based on plaintiff's exceptions to the 8th and 9th Instructions given by the Court to the jury (Tr. 143 and 144). All of the reasons assigned why the requested instructions set forth in Specifications 2, 3 and 4 should have been given, can be assigned with equal force against the giving of Instructions 8 and 9 set out in Specifications 6 and 7. The Court, in giving Instruction No. 8, obviously invaded the province of the jury, for not only was there evidence of the want and lack of consideration for the two thousand dollar note pleaded as a counterclaim, but we contend that the decided weight of the evidence preponderated in favor of the plaintiff on that proposition.

The jury are the exclusive judges of all questions of fact. Section 1023 of the Compiled Laws of the Territory of Alaska provides:

> "In charging the jury the Court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, but it shall not present the facts of the case, but shall inform the jury that they are the exclusive judges of all questions of fact."

Where there is evidence of a fact in issue, even though strongly contradicted, an instruction is erroneous which ignores that fact.

Anderson vs. N. P. Lumber Co., 28 Pac. 5;

Flore vs. Ladd, 36 Pac. 572;

Crossley vs. Reynolds, 196 Federal 640;

Dome City Bank vs. Barnett, 184 Federal 607; 38 Cyc. 1626 to 1633;

King vs. King, 83 Wash. 615;

Brown vs. Pullen, 259 Federal 858; 14 R. C. L. 728;

Wildey vs. Crane, 36 N. W. 734.

The 13th Instruction given the jury (Tr. 146 and 147), recited in the 8th Specification of Error, is faulty because it contains the following language:

> "Unless you find that said indebtedness of Weber and Petree was transferred to the Fairbanks Beverage Company by and with the consent of said David H. Cascaden"

because there is no evidence that Cascaden ever consented to the transfer of the indebtedness to him of the defendant and Petree to the Fairbanks Beverage Company. In fact, the evidence contradicts any such inference, because the Farmers' Bank note was delivered to Cascaden when he paid the same, and he did not surrender that note to the defendant or Petree when the Beverage Company

note was given to him, nor did he ever deliver that note to either Petree or the defendant (Tr. 50).

The note referred to was found by Mrs. Cascaden in the safety deposit box of her deceased husband after she was appointed guardian of his person (Tr. 79 and 80).

The 9th and 10th Specifications of Error are based on the giving of Instructions 15 and 16 (Tr. 147 and 148). Instruction No. 15 is an incorrect and a highly prejudicial statement of both law and fact. It is in direct conflict with Instructions 9 and 10, for in both of those instructions the Court assumes that the question as to whether or not the $3,033.00 note described in the further second and affirmative defense of defendant's answer (Tr. 12) was accepted by Cascaden as absolute payment of the note set out in the first cause of action of plaintiff's complaint was one for the jury, and such instructions direct the jury to determine that question according to the weight of the evidence.

Instruction No. 15 is also in conflict with Instruction No. 14, because in Instruction No. 14 the Court instructed the jury that the defendant admitted that Cascaden paid to the bank the principal and interest of the note on which plaintiff's first

cause of action is based, but in Instruction No. 15 the Court instructed the jury to find whether such payment had been made by Cascaden. Instruction No. 14 states the facts correctly, since it is admitted in the answer (Tr. 11), that Cascaden paid that note and interest to the bank. Instruction No. 15 does not correctly state the law since the Court assumes that the giving of a promissory note is absolute payment of an obligation, regardless of whether there is an agreement between the parties that the receiver of such note accepts the same as absolute payment of the original obligation, because the Court says that the taking of the note and mortgage for $3,033.00 from the Fairbanks Beverage Company constituted a payment of the promissory note set forth in plaintiff's first cause of action.

The giving of a note does not constitute payment of indebtedness unless there is a specific agreement to that effect. In the absence of such an agreement the note will be construed only as conditional payment. Instruction No. 15 is prejudicially faulty for another reason, because in it the Court instructed the jury that the question as to whether the Beverage Company note was paid is immaterial. We contend that that was a very material question, because there is no evidence that the

Beverage Company note was taken by Cascaden as absolute payment of the note set forth in plaintiff's first cause of action, which note was signed by Cascaden as surety and thereafter by him paid. In the absence of such an agreement it devolves upon the defendant to show that the Beverage Company note given to Cascaden was actually paid. The record in this case shows that the Beverage Company note was not paid (Tr. 123, 124, 125 and 126) shows the Marshal's Return on Special Execution. The plaintiff in this action brought an action against the Beverage Company to foreclose two certain mortgages (Tr. 87 to 127 inclusive). The two mortgages given to secure three notes were foreclosed and the Marshal's Return shows that only sufficient funds were realized from the sale of all the property mortgaged to pay the first two notes; no sum whatever was paid on the second mortgage, and the second mortgage was given to secure the note which the defendant contends the plaintiff accepted as payment of the note described in his first cause of action. The defendant (Tr. 54 and 55) virtually admits that the Beverage Company note given to the plaintiff, which note is in controversy herein, was never paid. The fact that the Beverage Company note was secured by a mortgage is immaterial.

"It is insisted that, although the acceptance of the note merely might not be payment, yet, treating the note as payment, as was done here, by crediting it as payment on appellee's books, and in statements of account rendered, shows that the note was taken in payment. We do not consider this any stronger evidence, in that regard, than were the receipts in full which were given in the cases cited from Johnson. In regard to the receipt in *Johnson vs. Weed,* the court remarked: 'It might still have been understood, consistently with the words of it [receipt], that the note was received in full, under the usual condition of its being a good note.' And so in *Brigham vs. Lally,* 130 Mass. 485, a case where such a note of a third person had been taken on an open account, and the debtor credited therewith, it was held that the trial court properly refused to rule that placing the note to the credit of the defendant upon the plaintiff's journal and ledger, and making no other appropriation of the money, was in law a payment. We think the ruling of the court here complained of is entirely well sustained by authority." *Cheltenham Stone & Gravel Co. vs. Gates Iron Co.,* 16 N. E. 923, at 924.

In *O'Bryan vs. Jones,* 38 Mo. Appeals, 90, the Court approved the following instruction given by the Trial Court:

"The Court declares the law to be that the delivery of the note of J. W. Carlyle by defendants to plaintiff and the acceptance by plaintiff of said note is to be treated prima facie as a conditional payment only; that it is a payment only if paid by maturity by the maker thereof, and before the Court can find that

the delivery and acceptance of said note was a payment absolute from defendants to plaintiffs it must believe from the evidence that said delivery and acceptance was under an express agreement that the plaintiff should take the note absolutely as payment, and at his own risk of collection; and in the absence of such express agreement the delivery and acceptance of the note would be no payment, if it afterwards appears to be of no value *and the proof that there was such an express agreement rests upon the defendants.*"

"Whether the taking of a note for the amount of a pre-existing note is payment of the first note is rather a question of fact than of law; and when a note is given signed by any other than the maker of the previous note and the previous note is retained by the payee as in this case, it is very clear that the law does not raise a presumption that such note is payment, and although no agreement in relation to it is specifically proved, the question whether or not it was given and received in payment is one of those facts which the jury must decide." *Woods vs. Woods,* 127 Mass. 141, the above quotation being made from page 149. *Mutual Benefit Life Insurance Co. vs. First National Bank,* 169 S. W. 1028. *National Bank vs. Jose,* 10 Wash. 185.

"Where in such transaction the note and mortgage evidencing the prior indebtedness are retained by the creditor and a new note and mortgage taken for the amount due on the same indebtedness, the taking of such new note and mortgage will not effectuate payment of the prior indebtedness unless there is an express agreement of the parties that such note and mortgage were received in payment and

satisfaction of such prior indebtedness." *Chamberlain Banking House vs. Woolsey,* 83 N. W. 729. *Ryan vs. Security Savings & Commercial Bank,* 271 Federal, 366.

"The acceptance by a creditor of the promissory note of his debtor for his antecedent debt does not extinguish it unless the note is paid. It is not an absolute, but a conditional payment of the debt." * * * *

"A clear agreement by the creditor that he will take the risk of the payment of the note, and that the debt is discharged thereby, or the indubitable intention of both the parties to that effect, is requisite to extinguish a debt by the taking of the debtor's note. An agreement that a debt shall be paid, or shall be payable, or that it has been paid by the note of the debtor, is a contract for an extension of the time of payment and that the debt shall be paid or that it has been paid by the note of the debtor on condition that the note is paid, but not otherwise." *A. Leschen & Sons Rope Co. vs. Mayflower G. M. & R. Co.,* 173 Federal, 855, at 857 and 858.

The opinion last quoted from was written by Judge Sanborn of the 8th Circuit and the writer of the opinion cites numerous authorities to sustain the doctrine announced. This Court said, in *Stewart vs. Laberee,* 185 Federal, 471 at 473:

"The writ of error presents the question of law whether upon the facts proven under the issues, it is shown that the indebtedness of the plaintiff in error to the construction company had been paid or satisfied. There is no evidence of an agreement between the parties that the

> notes were received as payment of the debt. In the absence of such an agreement the common law rule prevails in nearly all the states and is adopted in the Federal Courts, that the original demand is not paid or extinguished by the note."

It may be contended that there is evidence that the Beverage Company note was accepted as payment, because the defendant testified (Tr. 31), in response to a leading question by the Court, that the Beverage Company note was in payment of the Farmers' Bank note, but that is a mere conclusion of the witness, because he says that the note was paid when the mortgage was foreclosed, but the record of the foreclosure proceedings hereinbefore quoted shows that the note was not paid. Furthermore, the defendant did not state that the Beverage Company note was accepted as absolute payment of the Farmers' Bank note. He seemed to proceed upon the same theory as the Court, that the mere receipt by Cascaden of the Beverage Company note was payment of the other note. It may be contended that the minutes of the board of directors of the Beverage Company, being defendant's Exhibit 7 (Tr. 128, 129 and 130), indicates a transfer from defendant to the Beverage Company of defendant's obligation to plaintiff, but the only reasonable inference deducible from the minutes

of that meeting is that the Beverage Company note was to be taken by Cascaden merely as security for the payment of the other note, for the minutes state (Tr. 129 and 130):

> "And in order to obtain said loan and execute said security that the officers of this company be further authorized and directed to make, execute and deliver to the said Cascaden its promissory note for the amount of three thousand ($3,000.00) dollars and accumulated interest on said Farmers' Bank debt, secured by a second mortgage upon the assets of this company for the purpose of paying and liquidating the note and mortgage of three thousand ($3,000.00) dollars and interest due to the Farmers' Bank of Fairbanks, Alaska."

It cannot be inferred from the above quotation that it was intended by Cascaden and the other officers of the Beverage Company that Cascaden was to receive the Beverage Company note as absolute payment of the Farmers' Bank note. On the contrary, it appears that the officers of the Beverage Company, in order to procure the loan which the resolution shows it had procured from Cascaden, that that company was willing and desired to give him additional security for the payment of the note which he had paid the Farmers' Bank. We submit, therefore, that there is no evidence in the record to warrant an inference that Cascaden ever agreed or intended to receive the Beverage Com-

pany note as absolute payment of the Farmers' Bank note. The fact that Cascaden retained the bank note in his possession after the giving of the Beverage Company note, and the further fact that neither Petree nor the defendant, the principal makers of said note, ever demanded the same from Cascaden, is strong evidence that none of the parties intended that the Beverage Company note was to be taken by Cascaden as absolute payment of the Farmers' Bank note. Defendant's Exhibit 7 (Tr. 128, 129 and 130) strongly corroborates the contention that the Beverage Company note was given to and received by Cascaden as security for the payment of the Farmers' Bank note.

In Instruction No. 16 (Tr. 148 and 149), which is set forth in the 10th Specification of Error, the Court instructed the jury that there was no evidence that the Beverage Company note was given as security for the Farmers' Bank note, and as hereinbefore contended, we submit that all of the evidence in the record, including the retention of the Farmers' Bank note by the plaintiff after he had received the Beverage Company note, and the failure on the part of principal makers of the bank note to demand that note from the plaintiff after he had received the Beverage Company note, is persuasive

evidence of the fact that the Beverage Company note was received as security. The resolution of the board of directors of the Beverage Company shows that both Cascaden and that company intended that its note should be received by Cascaden as additional security for the payment of the bank note, because if it considered or believed that Cascaden was to receive its note as absolute payment of the bank note, then it would have further provided in that resolution for a surrender by Cascaden to that company of the bank note upon the execution and delivery of its note and mortgage securing the same to Cascaden.

We respectfully submit that the judgment of the Trial Court should be reversed and set aside for the reasons herein assigned.

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